

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW ALPER,

Plaintiff,

V.

DEAN HAMER and RANDOM HOUSE, INC.,

Defendants.

07 Civ. 2934 (PKC)

**ANSWER TO THE FIRST
AMENDED COMPLAINT**

Defendants Dean Hamer (“Hamer”) and Random House, Inc. (“Random House”) (together “Defendants”), by their undersigned attorneys Davis Wright Tremain LLP, as and for their Answer to the First Amended Complaint (“Amended Complaint”) of plaintiff Matthew Alper (“Alper” or “Plaintiff”), allege as follows:

1. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Amended Complaint.
2. Defendants admit the allegations in paragraph 2 of the Amended Complaint.
3. Defendants admit the allegations in paragraph 3 of the Amended Complaint.
4. To the extent the allegations in paragraph 4 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in paragraph 4 of the Amended Complaint are deemed allegations of fact, Defendants deny each and every allegation therein.
5. To the extent the allegations in paragraph 5 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in paragraph 5 of the Amended Complaint are deemed allegations of fact, Defendants deny each

and every allegation therein, except that Defendants admit that Random House engages in activity in the State of New York and transacts business in the State of New York.

6. Defendants admit the allegations in paragraph 6 of the Amended Complaint.

7. Defendants deny each and every allegation in paragraph 7 of the Amended Complaint.

8. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Amended Complaint.

9. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Amended Complaint, except that Defendants admit Plaintiff published a book entitled *The “God” Part of the Brain* marked “Copyright 1998.”

10. Defendants deny each and every allegation in paragraph 10 of the Amended Complaint.

11. Defendants deny the allegations set forth in the first sentence of paragraph 11 of the Amended Complaint, but admit that on page 81 of the First Edition of *The “God” Part of the Brain* Alper wrote, “[t]he fact that we process such a cross-cultural tendency to perceive reality with such a spiritual bent to it would suggest that we are physiologically **hard-wired** to perceive reality this way.” (bold added).¹ Defendants admit the allegations in second sentence of paragraph 11 of the Amended Complaint and respectfully refer the Court to the entire book for a more complete understanding of Alper’s theories in context.

12. Defendants deny each and every allegation in paragraph 12 of the Amended Complaint.

¹ Throughout this Answer, Defendants print in bold type words that are printed in bold type in the Amended Complaint. Defendants use italics to signify instances in which the Amended Complaint misquotes the books at issue.

13. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the Amended Complaint, except that Defendants deny that Alper is an expert in the field of Neurotheology.

14. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 of the Amended Complaint.

15. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 of the Amended Complaint.

16. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 of the Amended Complaint.

17. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 of the Amended Complaint.

18. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 of the Amended Complaint.

19. Defendants admit the allegations in paragraph 19 of the Amended Complaint.

20. Defendants admit the allegations in paragraph 20 of the Amended Complaint.

21. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21 of the Amended Complaint.

22. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the Amended Complaint.

23. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23 of the Amended Complaint, except that Defendants admit that a hardcover version of *The "God" Part of the Brain* was published in August 2006 by Sourcebooks Inc.

24. Defendants admit the allegations in paragraph 24 of the Amended Complaint, except state that Hamer is Chief of the Section on Gene Structure and Regulation in the Laboratory of Biochemistry at the National Institutes of Health.

25. Defendants admit the allegations in paragraph 25 of the Amended Complaint.

26. Defendants deny each and every allegation in paragraph 26 of the Amended Complaint, except that Defendants admit that in or about late June or early July 2000, Hamer purchased and received a copy of the 2000 edition of *The "God" Part of the Brain*.

27. Defendants admit the allegations in paragraph 27 of the Amended Complaint.

28. Defendants deny each and every allegation in paragraph 28 of the Amended Complaint.

29. Defendants deny each and every allegation in paragraph 29 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 81 of the First Edition and page 81 of the Fifth Edition of *The "God" Part of the Brain* and on page 2 of the Slate Article.

30. Defendants deny each and every allegation in paragraph 30 of the Amended Complaint, except that Defendants admit that the quoted language from Alper appears on the back jacket of the First and Fifth Editions of *The "God" Part of the Brain*, except that the back jacket of the First Edition of *The "God" Part of the Brain* reads in part "maintained a belief in some *sort* of a spiritual reality." (italics added).

31. Defendants deny each and every allegation in paragraph 31 of the Amended Complaint, except that Defendants admit that on or about July 5, 2000, plaintiff emailed Hamer to offer him a copy of *The "God" Part of the Brain*, and respectfully refer the Court to that email for its full contents.

32. Defendants admit the allegations in paragraph 32 of the Amended Complaint and respectfully refer the Court to that email for its full contents.

33. Defendants deny each and every allegation in paragraph 33 of the Amended Complaint, except that Defendants admit that Hamer had previously written extensively about the influence of genes on behavior in numerous publications, including *The Science of Desire* and *Living With Our Genes*.

34. Defendants deny each and every allegation in paragraph 34 of the Amended Complaint.

35. Defendants admit the allegations in paragraph 35 of the Amended Complaint.

36. Defendants deny each and every allegation in paragraph 36 of the Amended Complaint.

37. Defendants deny each and every allegation in paragraph 37 of the Amended Complaint.

38. Defendants deny each and every allegation in paragraph 38 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 81 of the First Edition and page 80 of the Fifth Edition of *The "God" Part of the Brain* and in the subtitle of *The God Gene*.

39. Defendants deny each and every allegation in paragraph 39 of the Amended Complaint.

40. Defendants deny each and every allegation in paragraph 40 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 64 of the First Edition and page 62 of the Fifth Edition of *The "God" Part of the Brain* and on page 6 of *The God Gene*.

41. Defendants deny each and every allegation in paragraph 41 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 41 of the Fifth Edition of *The “God” Part of the Brain* and on pages 82 and 89 of *The God Gene*, except that the language from page 89 of *The God Gene* is quoted in the Amended Complaint as “**monamine**” and should instead read “***monoamine***” (italics and bold added).

42. Defendants deny each and every allegation in paragraph 42 of the Amended Complaint, except that Defendants admit that the quoted language appears in a footnote on page 132 of the Fifth Edition of *The “God” Part of the Brain* and on page 58 of *The God Gene*.

43. Defendants deny each and every allegation in paragraph 43 of the Amended Complaint.

44. Defendants deny each and every allegation in paragraph 44 of the Amended Complaint, except that Defendants admit that the quoted language appears on pages 20, 98, and 96 respectively of the First Edition and on pages 98, 100 and 77 respectively of the Fifth Edition of *The “God” Part of the Brain* and on page 143 of *The God Gene*, except that the language from page 98 the First Edition of *The “God” Part of the Brain* should read “With this one cognition, the most powerful creature on earth was struck down, **incapacitated by the crippling awareness of** its own ***inevitable death***.” (italics and bold added).

45. Defendants deny each and every allegation in paragraph 45 of the Amended Complaint, except that Defendants admit that the quoted language appears in a footnote on page 77 of the Fifth Edition of *The “God” Part of the Brain* and on page 10 of *The God Gene*, except that the language from page 10 of *The God Gene* should read “**One of my *biggest* challenges is to attempt to separate spirituality from religion**.” (italics and bold added).

46. Defendants deny each and every allegation in paragraph 46 of the Amended Complaint.

47. Defendants deny each and every allegation in paragraph 47 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 167 of the First Edition, on page 169 of the Fourth Edition, and on page 186 of the Fifth Edition of *The “God” Part of the Brain* and on page 209 of *The God Gene*.

48. Defendants deny each and every allegation in paragraph 48 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 113 of the Fifth Edition of *The “God” Part of the Brain* and that some of the quoted language appears on page 133 of *The God Gene*, and further aver that the language from page 133 of *The God Gene* should read: “**His [Dostoyevsky’s]** interest in **mystical experiences** may have resulted from his **epilepsy**, which is documented in statements by his physicians, several biographies and his own voluminous writings. *Many of his fictional characters were tormented by their seizures, but Dostoyevsky enjoyed his – or at least the beginnings of them: “You strong people have no idea of the bliss which epileptics experience in the moments preceding their attacks. For several moments, I have a feeling of happiness which I never experienced in my normal state and which one cannot imagine. It is a complete harmony in myself and in the wide world . . .”* (italics and bold added).

49. Defendants deny each and every allegation in paragraph 49 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 154 of the Fifth Edition of *The “God” Part of the Brain* and on page 209 of *The God Gene*, except that the language from page 209 of *The God Gene* should read: “The **whirling dervishes**, *members of*

the Mevlevi sect of Islam, half chant and half shout the name of **Allah** as they perform their **swirling**, leaping, **ecstatic dance**.” (italics and bold added).

50. Defendants deny each and every allegation in paragraph 50 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 72 of the Fourth Edition and on page 71 of the Fifth Edition of *The “God” Part of the Brain* and on page 4 of *The God Gene*, except that the language from page 4 of *The God Gene* should read: “**More than 30,000 years ago**, our ancestors *in what today is Europe* **painted** the walls of their **caves** . . .” (italics and bold added).

51. Defendants deny each and every allegation in paragraph 51 of the Amended Complaint, except that Defendants admit that in *The “God” Part of the Brain* Alper discusses other behaviors that are a consequence of genes and biology to demonstrate the biological basis of spirituality, that Alper discusses musical aphasia, and that the quoted language appears on page 63 of the First Edition and on page 61 of the Fifth Edition of *The “God” Part of the Brain* and on page 131 of *The God Gene*, except that the language “Vassarian Shebalin” from page 131 of *The God Gene* should read “*Vissarian Shebalin, for example,*” and a final sentence is omitted which should read: “*Nevertheless, she reported that music still made her feel happy.*” (italics added).

52. Defendants deny each and every allegation in paragraph 52 of the Amended Complaint.

53. Defendants deny each and every allegation in paragraph 53 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 63 of the First Edition of *The “God” Part of the Brain* and on page 130 of *The God Gene*, except that the language from page 63 of the First Edition of *The “God” Part of the Brain* omits the footnote

reference (*9) which follows the quotation, and that the language quoted from page 130 of *The God Gene* reads “**excitation**” and should instead read “***activation***.” (italics and bold added).

54. Defendants deny each and every allegation in paragraph 54 of the Amended Complaint, except that Defendants admit that the quoted language appears on pages 53-54 and on page 55 of the Fifth Edition of *The “God” Part of the Brain* and on page 7 of *The God Gene*, except that the language from page 54 of *The “God” Part of the Brain* should read in part “a rebellied (*and hence male-looking*) wooden model,” and the language on page 7 of *The God Gene* should read “That the song is at least partly **innate** can be seen by its **species specificity: All male white-crowned sparrows sing *basically the same song*, even when they are separated from their parents after two weeks and raised in complete isolation *from any other birds***.” (italics and bold added).

55. Defendants deny each and every allegation in paragraph 55 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 167 of the First Edition and on page 182 of the Fifth Edition of *The “God” Part of the Brain* and on page 215 of *The God Gene*.

56. Defendants deny each and every allegation in paragraph 56 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 81 of the Fifth Edition of *The “God” Part of the Brain* and on page 6 of *The God Gene*, except that the language from page 81 of the Fifth Edition of *The “God” Part of the Brain* should read: “*[T]hough there is no physical evidence to confirm the existence of a spiritual reality, every culture has believed in one. This is rather unusual for a species of skeptics as ourselves. . . Unless we can see, feel, taste, smell, or touch something, we tend to be dubious of its existence.*” (italics and bold added).

57. Defendants deny each and every allegation in paragraph 57 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 14 of the First Edition and on page 14 of the Fifth Edition of *The “God” Part of the Brain* and on page 92 of *The God Gene*, except that the language from page 92 of *The God Gene* should read: The third key feature of **consciousness is that it is personal. It is yours and yours alone.** You can describe to *other* people *what* you see or how you feel, but the sights and feelings *themselves* are not transferable. This is **why you always experience the world from your own viewpoint,** *either as a direct participant or as an onlooker, not from the perspective of somebody else.”* (italics and bold added).

58. Defendants deny each and every allegation in paragraph 58 of the Amended Complaint, except that Defendants admit that the quoted language appears in a footnote on page 77 of the Fifth Edition of *The “God” Part of the Brain* and on page 10 of *The God Gene*, except that the quotation from page 10 of *The God Gene* omits the end of the last sentence which should conclude: *“and score high on the self transcendence scale.”* (italics added).

59. Defendants deny each and every allegation in paragraph 59 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 110 of the Fourth Edition and on page 114 of the Fifth Edition of *The “God” Part of the Brain* and on page 131 of *The God Gene*, except that the language from page 131 of *The God Gene* should read in part **“Fyodor Mikhailovich Dostoyevsky.”** (italics and bold added).

60. Defendants deny each and every allegation in paragraph 60 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 43 of the First Edition and on pages 42 and 13 of the Fifth Edition of *The “God” Part of the Brain* and on pages 90 and 91 of *The God Gene*, except that the language from page 90 of *The God Gene*

should read in part: “Our brains are **bombarded** with information every second of every minute *of the day, day in and day out*” and that the language from page 91 of *The God Gene* should read: “My brain is *certainly* no computer. *It can’t even beat my puny laptop at chess.* And yet it receives, sorts, processes, and analyzes this incredible volume of data with the greatest of ease to produce the most remarkable of all products: **a seemingly coherent picture of the world that surrounds me.**” (italics and bold added).

61. Defendants deny each and every allegation in paragraph 61 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 73 of the First Edition and on page 73 of the Fifth Edition of *The “God” Part of the Brain* and on page 4 of *The God Gene*.

62. Defendants deny each and every allegation in paragraph 62 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 169 of the Fourth Edition and on page 186 of the Fifth Edition of *The “God” Part of the Brain* and on pages 209-10 of *The God Gene*.

63. Defendants deny each and every allegation in paragraph 63 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 34 of the First Edition and on pages 33-34 of the Fifth Edition of *The “God” Part of the Brain* and on page 140 of *The God Gene*.

64. Defendants deny each and every allegation in paragraph 64 of the Amended Complaint, except that Defendants admit that the quoted language appears on the back jacket of the First and Fifth Editions of *The “God” Part of the Brain* and on page 4 of *The God Gene*, except that the back jacket of the First Edition of *The “God” Part of the Brain* reads in part “maintained a belief in some *sort* of a spiritual reality.” (italics added).

65. Defendants deny each and every allegation in paragraph 65 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 92 of the First Edition and on page 94 of the Fifth Edition of *The “God” Part of the Brain* and on page 163 of *The God Gene*, except that the language from page 163 of *The God Gene* omits the conclusion of the sentence which should read “*and process it more quickly.*” (italics added).

66. Defendants deny each and every allegation in paragraph 66 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 118 of the Fifth Edition of *The “God” Part of the Brain* and on page 93 of *The God Gene*, except that the last sentence from page 118 of the Fifth Edition of *The “God” Part of the Brain* should conclude “*be it one’s name, address, family, history, etc.*” (italics added).

67. Defendants deny each and every allegation in paragraph 67 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 67 of the First Edition and page 66 of the Fifth Edition of *The “God” Part of the Brain* and on page 141 of *The God Gene*, except that the language from the First and Fifth Editions of *The “God” Part of the Brain* omits the footnote reference which follows the quotation (*13 and *14 respectively).

68. Defendants deny each and every allegation in paragraph 68 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 107 of the First Edition and page 109 of the Fifth Edition of *The “God” Part of the Brain* and on page 83 of *The God Gene*, except that the language from both editions of *The “God” Part of the Brain* should read “**“The mystical experience of God has certain characteristics common to all faiths”**”, the language from both editions omits the quote marks and footnote references (*30 and *37 respectively) which follow the passage and identify the author as Karen Armstrong, and the language from page 83 of *The God Gene* omits the quote marks at the beginning and end of the

passage which identify it as a quotation from the published works of W.N. Pahnke. (italics and bold added).

69. Defendants deny each and every allegation in paragraph 69 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 125 of the First Edition and page 129 of the Fifth Edition of *The “God” Part of the Brain* and on page 81 of *The God Gene*, except that the language from the both editions of *The “God” Part of the Brain* omits the quote marks and footnote references (*60 and *73 respectively) which follow the first sentence of the passage and identify it as a quotation from the published works of C.D. Batson.

70. Defendants deny each and every allegation in paragraph 70 of the Amended Complaint.

71. Defendants deny each and every allegation in paragraph 71 of the Amended Complaint, except that Defendants admit that Book Two, Chapter One of the First and Fifth Editions of *The “God” Part of the Brain* are entitled **The “Spiritual” Function**, and Chapter One of *The God Gene* is entitled **Spiritual Instinct**. (bold added).

72. Defendants deny each and every allegation in paragraph 72 of the Amended Complaint, except that Defendants admit that a sub-chapter of Book Two, Chapter One of the First Edition of *The “God” Part of the Brain* is entitled **Universal Spiritual Practices and Beliefs**, a sub-chapter of Book Two, Chapter One of the Fifth Edition of *The “God” Part of the Brain* is entitled **Universal Spiritual Beliefs and Practices**, and that a sub-chapter of Chapter One of *The God Gene* is entitled **A Human Universal**. (italics and bold added).

73. Defendants deny each and every allegation in paragraph 73 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 78 of the

First Edition and page 78 of the Fifth Edition of *The "God" Part of the Brain* and that Chapter Three of *The God Gene* is entitled **An Inherited Predisposition**. (bold added).

74. Defendants deny each and every allegation in paragraph 74 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 110 of the First Edition and page 112 of the Fifth Edition of *The "God" Part of the Brain* and that a sub-chapter of Chapter Seven of *The God Gene* is entitled **This is Your Brain on Zazen**. (bold added).

75. Defendants deny each and every allegation in paragraph 75 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 134 of the Fifth Edition and page 110 of the Fourth Edition of *The "God" Part of the Brain* and that a sub-chapter of *The God Gene* is entitled **The Minnesota Experiment**, except that the language from both editions of *The "God" Part of the Brain* omits the footnote references (*86 and *52 respectively which follow each passage and identify it as a quotation from an article by Dr. Raj Persaud in *The New York Times*, May 8-9, 1999).

76. Defendants deny each and every allegation in paragraph 76 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 114 of the Fifth Edition and page 110 of the Fourth Edition of *The "God" Part of the Brain* and that a sub-chapter of *The God Gene* at page 135 is entitled **The God Spot**, and that both works discuss the research of Michael Persinger. (bold added).

77. Defendants deny each and every allegation in paragraph 77 of the Amended Complaint, except that Defendants admit that the quoted language appears on page 132 of the First Edition and page 140 of the Fifth Edition of *The "God" Part of the Brain* and that a sub-chapter of *The God Gene* is entitled **Faith Healing**. (bold added).

78. Defendants deny each and every allegation in paragraph 78 of the Amended Complaint, except that Defendants admit that the quoted language appears in a footnote on page 77 of the Fifth Edition of *The “God” Part of the Brain* and that a sub-chapter of *The God Gene* is entitled **The Difference Between Spirituality and Religiousness** and appears on page 50, not page 10 as alleged. (bold added).

79. Defendants deny each and every allegation in paragraph 79 of the Amended Complaint, except that Defendants admit that Hamer was interviewed by Jeffrey Kluger who published an article on or about October 17, 2004 in *Time Magazine* which quotes Hamer and cites *The God Gene* among other authors and books. Defendants respectfully refer the Court to the *Time Magazine* article for its full and accurate content.

80. Defendants deny each and every allegation in paragraph 80 of the Amended Complaint.

81. Defendants repeat their responses to paragraphs 1-80 of the Amended Complaint.

82. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 82 of the Amended Complaint.

83. Defendants admit that *The “God” Part of The Brain* is a literary work which contains some expression which is original and a proper subject of copyright, but contend that Hamer has not infringed upon any copyrightable expression in *The “God” Part of the Brain*.

84. Defendants deny each and every allegation in paragraph 84 of the Amended Complaint except that Defendants admit that in or about late June or early July, 2000 Hamer purchased a copy of the 2000 Edition of *The “God” Part of the Brain*, that Hamer skimmed or read portions of the 2000 Edition of *The “God” Part of the Brain*, and that Random House, Inc. published, distributed, sold, and promoted a book by Hamer entitled *The God Gene*.

85. To the extent the allegations in paragraph 85 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in paragraph 85 of the Amended Complaint are deemed allegations of fact, Defendants deny the allegations therein.

86. To the extent the allegations in paragraph 86 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in paragraph 86 of the Amended Complaint are deemed allegations of fact, Defendants deny the allegations therein.

87. To the extent the allegations in paragraph 87 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in paragraph 87 of the Amended Complaint are deemed allegations of fact, Defendants deny the allegations therein.

88. Defendants repeat their responses to paragraphs 1-87 of the Amended Complaint.

89. To the extent the allegations in paragraph 89 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in paragraph 89 are deemed allegations of fact, Defendants deny the allegations therein.

90. To the extent the allegations in paragraph 90 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in paragraph 90 of the Amended Complaint are deemed allegations of fact, Defendants deny the allegations therein.

91. To the extent the allegations in paragraph 91 of the Amended Complaint are allegations of law, Defendants are not required to plead thereto; to the extent the allegations in

paragraph 91 of the Amended Complaint are deemed allegations of fact, Defendants deny the allegations therein.

INTRODUCTION TO AFFIRMATIVE DEFENSES

92. Under the law, it is Plaintiff's burden to prove many of the issues raised in the affirmative defenses set forth below. It is Defendants' intent to preserve, and not to waive, its legal position that Plaintiff maintains the burden of proof on these issues.

FIRST AFFIRMATIVE DEFENSE

93. The First Amended Complaint fails, in whole or in part, to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

94. The First Amended Complaint is barred, in whole or in part, by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

95. Defendants' allegedly infringing works are not substantially similar to any protectible elements of any editions of *The "God" Part of the Brain*.

FOURTH AFFIRMATIVE DEFENSE

96. Any similarity between Plaintiff's alleged works on the one hand and Defendants' allegedly infringing works on the other consists solely of material that is not original to the Plaintiff, and/or consists solely of facts, ideas, unprotectible stock elements, scenes a faire, or common phrases and is therefore not actionable.

FIFTH AFFIRMATIVE DEFENSE

97. Defendants' works and each of them were the product of independent creation.

SIXTH AFFIRMATIVE DEFENSE

98. Defendants did not have access to some or all of the editions of *The “God” Part of the Brain*.

SEVENTH AFFIRMATIVE DEFENSE

99. Defendants’ actions were not willful.

EIGHTH AFFIRMATIVE DEFENSE

100. Any use by Defendants of protectible material from *The “God” Part of the Brain*, which such use is explicitly denied, is *de minimis* and therefore non-actionable.

NINTH AFFIRMATIVE DEFENSE

101. Defendants’ use of Plaintiff’s alleged works is a fair use and therefore non-actionable.

TENTH AFFIRMATIVE DEFENSE

102. Upon information and belief, Plaintiff does not hold a valid copyright in *The “God” Part of the Brain*, and/or in some of the editions of *The “God” Part of the Brain*.

ELEVENTH AFFIRMATIVE DEFENSE

103. Plaintiff’s claims are barred by the merger doctrine under copyright law.

TWELFTH AFFIRMATIVE DEFENSE

104. Upon information and belief, Plaintiff has not obtained a valid copyright registration in some or all editions of *The “God” Part of the Brain*.

THIRTEENTH AFFIRMATIVE DEFENSE

105. The Court lacks jurisdiction over Plaintiff’s claims because Plaintiff failed to obtain a valid copyright registration for each edition of Plaintiff’s work cited in the Amended Complaint prior to instituting the action.

FOURTEENTH AFFIRMATIVE DEFENSE

106. Pursuant to 17 U.S.C. § 412, Plaintiff is precluded from recovering statutory damages or attorney's fees in connection with any claims based on editions of *The "God" Part of the Brain* where the alleged infringement of copyright commenced after first publication of such work and before the effective date of its registration.

FIFTEENTH AFFIRMATIVE DEFENSE

107. Plaintiff has not suffered any actual damages.

SIXTEENTH AFFIRMATIVE DEFENSE

108. Defendants have not reaped any profits attributable to any infringement(s).

SEVENTEENTH AFFIRMATIVE DEFENSE

109. Plaintiff is not entitled to attorneys' fees and/or statutory damages.

EIGHTEENTH AFFIRMATIVE DEFENSE

110. Plaintiff's claim for "False Designation of Origin" fails to state a claim since *The God Gene* properly identifies that it is produced by Doubleday or Anchor Books.

NINETEENTH AFFIRMATIVE DEFENSE

111. Plaintiff's claim for "False Designation of Origin" is barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

TWENTIETH AFFIRMATIVE DEFENSE

112. Plaintiff's claim for "False Designation of Origin" is preempted by the Copyright Act.

TWENTY-FIRST AFFIRMATIVE DEFENSE

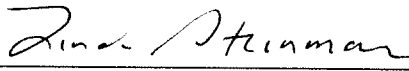
113. Plaintiff's claims are barred by the equitable doctrines of acquiescence, waiver, estoppel and laches.

WHEREFORE, Defendants Dean Hamer and Random House, Inc. respectfully request that this Court:

- (1) Enter judgment in favor of Defendants on the Amended Complaint, dismissing the Amended Complaint with prejudice;
- (2) Award Defendants prevailing party attorney's fees under 17 U.S.C. § 505;
- (3) Award Defendants their costs and disbursements in this action; and
- (4) Afford Defendants such other and further relief as this Court may deem just and proper.

Date: New York, New York
July 18, 2007

DAVIS WRIGHT TREMAINE LLP

By: 
Linda Steinman (LS 5906)
Elizabeth A. McNamara (EM 1987)
Christopher J. Robinson (CR 9165)
1633 Broadway
New York, NY 10019(212) 489-8230

*Counsel for Defendants
Dean Hamer and Random House, Inc.*

TO: Michael A. Cornman, Esq.
SCHWEITZER CORNMAN GROSS
& BONDELL LLP
292 Madison Avenue, 19th Floor
New York, NY 10017

Counsel for Plaintiff